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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHRISTIAN A. LINDENSMITH

Appeal 2020-000507
Application 13/932,558
Technology Center 3600

Before ERIC B. GRIMES, FRANCISCO C. PRATS, and
TAWEN CHANG, *Administrative Patent Judges*.

CHANG, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 3, 5–10, 12, and 14–18. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

STATEMENT OF THE CASE

The disclosure relates generally to the proper sales affiliate credit and tracking of digital consumer goods, and

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Bitingduck Press, LLC. Appeal Br. 1.

more specifically to a method for crediting a physical affiliate for the sale of digital media to a consumer who downloads a deliverable unto their personal viewing, recording, listening, or computing device after sampling or viewing the product in the physical affiliate's location.

Spec. ¶ 2.

CLAIMED SUBJECT MATTER

The claims are directed to a computer program product, or a non-transitory processor readable medium storing one or more software programs, for providing credit to a physical affiliate for a purchase of a digital product from an internet merchant different from the physical affiliate. Claim 1 is illustrative:

1. A computer program product for providing credit to a physical affiliate for a purchase of a digital product from an internet merchant different from the physical affiliate, the computer program product comprising:
 - a non-transitory processor readable medium comprising:
 - computer-readable program code that when executed by hardware receives product information via a port of a communication device of a computer system which product information identifies the digital product or group of digital products for purchase wherein the product information is obtained and decoded via a client device from a physical item having attached thereto at least one of a bar code, a QR code or other binary printed code which contains the product information which identifies the digital product, an internet address identifying the internet merchant, and said physical affiliate;
 - computer-readable program code that when executed by hardware determines that the digital product was purchased from the internet merchant via the client device;
 - computer-readable program code that when executed by hardware delivers the digital product to a recipient

device by downloading the digital product via a computer network; and computer-readable program code that when executed by hardware provides credit to the physical affiliate based on determining that the product information obtained via the client device identifies the physical affiliate in a code database and determining that the digital product was purchased from the internet merchant using the product information and in an absence of any participation in the purchase by a point of sale or other system owned or operated by the physical affiliate, and without requiring the client device to be located at the physical affiliate when the digital product was purchased from the internet merchant.

Appeal Br. 43–44 (Claims App.).

REJECTIONS

- A. Claims 1, 3, 5–10, 12, and 14–18 are rejected under 35 U.S.C. § 112(b) or 35 U.S.C. § 112 (pre-AIA), second paragraph, as being indefinite. Final Act. 2.
- B. Claims 1–3, 5–10, 12, and 14–18² are rejected under 35 U.S.C. § 101 as being directed toward at least one judicial exception to patent-eligible subject matter, without significantly more. Final Act. 3.

² In the Final Rejection, the Examiner states that claims 1–3, 5–12, and 14–18 are rejected under 35 U.S.C. § 101. However, claims 2 and 11 has been cancelled. Appeal Br. 44, 47 (Claims App.).

- C. Claims 1, 3, 5–8, 10, 12, and 14–17 are rejected under 35 U.S.C. § 103(a) (pre-AIA) as being unpatentable over Bezos³ and Foulser.⁴ Final Act. 6.⁵
- D. Claims 9 and 18 are rejected under 35 U.S.C. § 103(a) (pre-AIA) as being unpatentable over Bezos, Foulser, and Reber.⁶ Final Act. 10.

OPINION

A. Indefiniteness rejection (claims 1, 3, 5–10, 12, and 14–18)

1. Issue

The Examiner concludes that the phrase, “without requiring the client device to be located at the physical affiliate when the digital product was purchased from the internet merchant,” is indefinite, because “[t]he physical affiliate as recited appears to mean a place/store, i.e.[,] that the physical affiliate is a brick and mortar location,” whereas “as originally presented the affiliate is a person who is credited when a product is purchase[d].” Final Act. 2. Accordingly, the Examiner asserts that “it is not clear if the limitation ‘without requiring the client device to be located at the physical

³ Bezos et al., US 6,092,141, issued Feb. 22, 2000.

⁴ Foulser et al., US 8,069,088 B1, issued Nov. 29, 2011.

⁵ The Examiner states in the Final Action that claims 1, 3, 5–10, 12, and 14–18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Bezos and Foulser. Final Act. 6. However, the Examiner does not provide any analysis with respect to claims 9 and 18 in the section of the Final Action discussing the rejection over Bezos and Foulser, and further provides a separate rejection of claims 9 and 18 over Bezos, Foulser, and Reber. Final Act. 10–11. Thus, we understand that the Examiner’s obviousness rejection over Bezos and Foulser applies to claims 1, 3, 5–8, 10, 12, and 14–17.

⁶ Reber et al., US 2002/0129121 A1, published Sept. 12, 2002.

affiliate’ means located at a place/store, or at any location where the physical affiliate (person) is actually present.” Ans. 4.⁷

Appellant contends that “the term ‘affiliate’ cannot reasonably be interpreted to mean ‘a person’ who is credited when a product is purchased” and that, instead, “[t]he intended meaning of the term affiliate from the specification is a physical merchant, a retailer or party with a physical presence.” Appeal Br. 14.

The issue with respect to this rejection is whether a preponderance of evidence supports the Examiner’s conclusion that the phrase “without requiring the client device to be located at the physical affiliate” is indefinite.

2. *Analysis*

We conclude that the affiliate may be “a person who is credited when a product is purchase[d],” because for example claim 3 recites that “the physical affiliate is an *author* of the digital product.” Appeal Br. 44 (Claims App.) (emphasis added); *see also* Spec. ¶ 75 (explaining that “authors or musical artists could sell electronic copies of their works at public

⁷ In the Final Action, the Examiner further concludes that there is insufficient antecedent basis for the limitation, “the location of the physical affiliate,” in claims 9 and 18. Final Act. 3. However, an amendment was entered on March 13, 2019 amending the limitation “*the* location of the physical affiliate” to “*a* location of the physical affiliate.” Advisory Action 2 (Mar. 13, 2019); Response to Final Action 4, 7 (Mar. 13, 2019). As a result, this rejection appears to have been withdrawn. Advisory Act. 2; Ans. 4. In particular, the Examiner states in the Answer that the rejection for lack of written description as to claims 9 and 18 has been withdrawn. Although a claim limitation lacking antecedent basis is usually rejected as indefinite rather than as lacking in written description, we understand that the rejection withdrawn is the rejection based on the lack of antecedent basis.

appearances and get credit as an affiliate seller in addition to their normal royalty”).

However, we are not persuaded by the Examiner’s apparent position that merely because a physical affiliate may include a person, such as an author, that it could not also include “a place/store, i.e.[,] . . . a brick and mortar location.” Final Act. 2. Indeed, the Specification suggests that “physical affiliate” encompasses *both* a person and a store. For instance, the Specification describes an affiliate as “a retailer *or* party with a physical presence.” Spec. ¶ 34; *see also id.* ¶ 63 (providing as examples of affiliates “retailers, merchants, authors, and the like”), ¶ 18 (describing a bookstore (“Joe[’]s bookstore”) as an affiliate), ¶ 22 (describing a physical retailer as an affiliate), ¶ 70 (describing a beauty salon, a live music venue, and a bookstore or music store as affiliates).

Having construed “physical affiliate” to encompass “a retailer or party with a physical presence,” i.e., encompassing both a store or a person, we are also not persuaded by the Examiner’s position that “it is not clear if the limitation ‘without requiring the client device to be located at the physical affiliate’ means located at a place/store, or at any location where the physical affiliate (person) is actually present.” Ans. 4. In our view, a skilled artisan reading the claims in light of the Specification would understand that, where the physical affiliate is a person, “without requiring the client device to be located at the physical affiliate” means the client device is not physically present at the same location as the person (e.g., at the location of a public appearance). On the other hand, where the physical affiliate is a retailer or store, “without requiring the client device to be located at the physical

affiliate means that the client device is not physically present at the brick-and-mortar retailer or store.

B. Subject matter eligibility rejection (claims 1–3, 5–10, 12, and 14–18)

1. Issue

The Examiner concludes that claim 1 is directed to “the concept of managing and compensating an affiliate similar to the abstract idea of both certain methods of organizing human activity and fundamental economic practices, which is similar to the concept of managing relationships or transactions between people and creating contractual relationship[s] found ineligible in *buySAFE[, Inc. v. Google, Inc.]*, 765 F.3d 1350 (Fed. Cir. 2014)].” Final Act. 3–4. The Examiner concludes that the additional limitations in the claim “are used only for data gathering and/or insignificant extra-solution activity,” merely “attempt to limit the abstract idea to a particular technological environment,” and/or “merely instruct the practitioner to implement the abstract idea with high-level, generic technology executing basic computer functions.” *Id.* at 4–5. The Examiner concludes that, “[t]herefore, the limitations of the claim as a whole, when viewed individually and as an ordered combination, do not amount to significantly more than the abstract idea.” *Id.* at 5.

Appellant contends that the claims integrate any alleged abstract concepts into a practical application, because they “improve upon technology for selling / distributing digital products, i.e., exclusively digital content” and/or “solve a technological problem related to the sale of digital content.” Appeal Br. 21, 25, 27; Reply Br. 3–5. Appellant further contends

that the claims recite additional limitations that are not well understood, routine, or conventional. *Id.* at 17, 18, 24.

Appellant does not separately argue the claims; we, therefore, focus our analysis on claim 1 as representative. The issues with respect to this rejection are (1) whether claim 1 integrates the recited abstract ideas into a practical application, and (2) whether the additional elements recited in the claim beyond the judicial exception, taken individually and in combination, results in the claim, as a whole, amounting to significantly more than the exception.

2. *Analysis*

We analyze this case under the framework the Supreme Court set forth in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012) and applied in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014). As the Supreme Court explained in *Alice*:

In *Mayo* . . . we set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts. . . . If so, we then ask, “[w]hat else is there in the claims before us?” . . . To answer that question, we consider the elements of each claim both individually and “as an ordered combination” to determine whether the additional elements “transform the nature of the claim” into a patent-eligible application. . . . We have described step two of this analysis as a search for an “‘inventive concept’”—*i.e.*, an element or combination of elements that is “sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.”

Alice, 573 U.S. at 217–218.

Whether Claim 1 Is Directed to Patent-Ineligible Concept

We begin with the first step of the *Mayo* test, namely whether a claim is “directed to” a patent-ineligible concept. On January 7, 2019, the Director of the USPTO issued the “2019 Revised Patent Subject Matter Eligibility Guidance” (“Revised Guidance”), which provides further details regarding how the Patent Office analyzes patent-eligibility questions under 35 U.S.C. § 101. 84 Fed. Reg. 50–57 (Jan. 7, 2019). Under the Revised Guidance, the first step of the *Mayo* test (i.e., Step 2A of the Revised Guidance) is “a two-pronged inquiry.” *Id.* at 54. In prong one, we evaluate whether the claim recites a judicial exception, such as laws of nature, natural phenomena, or abstract ideas. *Id.* If the claim recites a judicial exception, the claim is further analyzed under prong two, which requires “evaluat[ion of] whether the claim recites additional elements that integrate the exception into a practical application of that exception.” *Id.* The Revised Guidance explains that, “[i]f the recited exception is integrated into a practical application of the exception, then the claim is eligible at Prong Two of . . . Step 2A [of the Revised Guidance].” *Id.*

Prong One of Step 2A of Revised Guidance

Following the Revised Guidance, we first consider whether claim 1 recites a judicial exception such as an abstract idea.

Courts have held that patent-ineligible abstract ideas include certain methods of organizing human activity, such as fundamental economic practices, commercial or legal interactions, and managing personal behavior or relationships or interactions between people. *See, e.g., Alice*, 573 U.S. at 219–20; *Bilski v. Kappos*, 561 U.S. 593, 611 (2010). Abstract ideas also include mental processes, including subject matter that covers performance

in the mind but for the recitation of generic computer components.

Gottschalk v. Benson, 409 U.S. 63, 69 (1972); *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1324 (Fed. Cir. 2016) (holding that computer-implemented method for “anonymous loan shopping” was an abstract idea because it could be “performed by humans without a computer”).

We find that all the steps of claim 1, collectively as an ordered combination, recite a method of “providing credit to a physical affiliate for a purchase of a digital product from an internet merchant different from the physical affiliate,” which is a method of organizing human activity (e.g., commercial interactions) similar to other concepts that have been identified by the courts as abstract. *See, e.g., Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372, 1378–1379 (Fed. Cir. 2017) (holding that “local processing of payments for remotely purchased good” is a “fundamental economic practice” that, without more, falls within a judicial exception to patentable subject matter); *In re Ferguson*, 558 F.3d 1359, 1364 (Fed. Cir. 2009) (holding ineligible claims directed to a method comprising obtaining a share of total profits from different companies and an exclusive right to market certain products made by such companies, in return for using a shared marketing force to market the products).

Claim 1 on appeal is similar to the claims at issue in *Bilski* and *Alice*, in that it is directed to a computer-implemented method for carrying out a process that was widespread long before computers, the Internet, and electronic commerce, i.e., the payment of a referral fee. More particularly, the steps performed by the computer-readable program code of claim 1 correspond to the electronic versions of:

- receiving product information identifying the product to be purchased (“information which identifies the digital product”), the identity/location of the seller (“an internet address identifying the internet merchant”), and the identity of the referring party (“physical affiliate”), wherein the product information is obtained by a customer from a physical item (“wherein the product information is obtained and decoded via a client device from a physical item having attached thereto at least one of a bar code, a QR code or other binary printed code”);
- determining that the product was purchased by the customer from the seller (“determines that the digital product was purchased from the internet merchant via the client device”);
- providing the product to the client (“delivers the digital product to a recipient device by downloading the digital product via a computer network”);
- paying the referring party (“provides credit to the physical affiliate”) based on the referring party information provided by the customer (“determining that the product information obtained via the client device identifies the physical affiliate in a code database and determining that the digital product was purchased from the internet merchant using the product information”), without requiring the participation of the referring party or requiring that the customer to purchase the product at the referring party.

Furthermore, we note that among the above steps there are also those that may be performed entirely in the human mind, for instance “receiving product information,” “obtain[ing] and decod[ing] . . . product information,”

“determin[ing] that the digital product was purchased from the internet merchant via the client device” and “determining that the product information obtained via the client device identifies the physical affiliate in a code database and determining that the digital product was purchased from the internet merchant using the product information.”

Thus, we agree with the Examiner that claim 1 recites an abstract idea: the claim recites a computer program product for performing “methods of organizing human activity” – specifically, “commercial . . . interactions” such as “business relations” – that have been recognized as abstract ideas and also recites mental processes that can be performed by humans without a computer. *See* 84 Fed. Reg. at 52.

Prong Two of Step 2A of Revised Guidance

Although claim 1 recites an abstract idea, it would still be patent-eligible if “the claim as a whole integrates the recited judicial exception into a practical application of the exception”; i.e., whether the claim “appl[ies], rel[ies] on, or use[s] the judicial exception in a manner that imposes a meaningful limit on the judicial exception.” 84 Fed. Reg. at 54. This analysis includes “[i]dentifying whether there are any additional elements recited in the claim beyond the judicial exception(s)” and “evaluating those additional elements individually and in combination to determine whether they integrate the exception into a practical application.” *Id.* at 54–55.

In this case, the only additional elements recited in claim 1 beyond the judicial exceptions are (1) “[a] computer program product,” (2) “non-transitory processor readable medium,” (3) “computer-readable program code,” (4) “hardware,” (5) “a port of a communication device of a computer system,” (6) “client device,” (7) “physical item having attached thereto at

least one of a bar code, a QR code or other binary printed code,” (8)
“downloading the digital product via a computer network,” and (9)
“database.”

We agree with the Examiner that these additional elements, individually or in combination, do not integrate the exception into a practical application.

One of the “examples in which a judicial exception has not been integrated into a practical application” is when “[a]n additional element . . . merely includes instructions to implement an abstract idea on a computer, or merely uses a computer as a tool to perform an abstract idea.” 84 Fed. Reg. at 55. *See also buySAFE, Inc. v. Google, Inc.*, 765 F.3d at 1354 (stating that “[t]he Court in *Alice* made clear that a claim directed to an abstract idea does not move into section 101 eligibility territory by ‘merely requir[ing] generic computer implementation’”) (alteration in original). Likewise, “an additional element [that] adds insignificant extra-solution activity to the judicial exception” or “does no more than generally link the use of a judicial exception to a particular technological environment or field of use” does not integrate a judicial exception into a practical application. 84 Fed. Reg. at 55.

In this case, the majority of the additional elements in the claim recite only generic hardware and software elements, e.g., “computer program product,” “non-transitory processor readable medium,” “computer-readable program code,” “hardware,” “a port of a communication device of a computer system,” “client device,” and “database.” Moreover, the recited functions performed by these elements – “receiv[ing] . . . information,” “obtain[ing] and decod[ing]” information, “downloading,” making certain determinations, and “provid[ing] credit” (e.g., transferring funds) are all

conventional functions of a computer. Thus, claim 1 essentially implements an abstract idea on a computer, which does not suffice to integrate the abstract idea into a practical application. 84 Fed. Reg. at 55.

Similarly, obtaining the product information from a “physical item having attached thereto at least one of a bar code, a QR code or other binary printed code” is insignificant extra-solution activity, because it is merely a data gathering step to obtain the information necessary to provide credit to the appropriate referring party. 84 Fed. Reg. 55, n. 31 (explaining that “a mere data gathering step such as a step of obtaining information about credit card transactions so that the information can be analyzed in order to detect whether the transactions were fraudulent” only adds insignificant extra-solution activity to a judicial exception and does not integrate a judicial exception into a practical application).

Finally, the claim is limited to providing credit for the purchase of a “digital product” and requires “downloading the digital product via a computer network.” However, that the claim limits the use of the judicial exception (i.e., the abstract idea of the payment of referral fees) to purchase of digital products “does no more than generally link the use of [the] judicial exception to a particular technological environment or field of use” and also does not suffice to integrate the judicial exception into a practical application. 84 Fed. Reg. at 55.

In summary, claim 1 recites an abstract idea and does not integrate the abstract idea into a practical application. Therefore, claim 1 is directed to an abstract idea.

Whether Claim 1 Amounts to “Significantly More”

Finally, the Revised Guidance directs us to consider whether claim 1 includes “additional elements . . . [that] provide[] ‘significantly more’ than the recited judicial exception.” 84 Fed. Reg. at 56. The Revised Guidance states that an additional element that “simply appends well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception . . . is indicative that an inventive concept may not be present.” *Id.*

Here, as discussed, the only elements recited in claim 1, other than the abstract idea itself, are generic computer components (i.e., “[a] computer program product,” “non-transitory processor readable medium,” “computer-readable program code,” “hardware,” “a port of a communication device of a computer system,” “client device,” and “database”) and “physical item having attached thereto at least one of a bar code, a QR code or other binary printed code.”

The Specification makes clear that all of these elements are well-understood, routine, and conventional. For instance, the Specification states, that, with respect to “internet merchant block 12,”

[t]he processor 26 . . . may be *any type of processor*
The non-transitory processor readable medium 28
may be implemented as *any type of memory* The
communications device 30 . . . may be implemented as
*an optical communications device; a wired
communication device . . . or a wireless communication
device* The input device . . . may be implemented as
. . . *any . . . device capable of transmitting signals from a
user to the processor 26*. The output device . . . may be . . .
. *any . . . output device* capable of transmitting signals

from the processor 26 to the user in a user perceivable format.

Spec. ¶ 37 (emphasis added). The Specification similarly states that “[t]he web server 32 may be a *standard general purpose web server* 32 with general purchase store software,” that “[t]he code database 42 may be implemented with hardware and software,” and that “[t]he transaction processing module 36 may be any module, implemented as hardware and/or software, *commonly available*, or a custom module, which processes transactions between the customer 22 and the internet merchant 24.” *Id.* ¶¶ 38, 41, 45 (emphasis added).

Likewise, the Specification teaches that “[t]he client device 14 may be implemented as a mobile phone, a tablet computer, an electronic book reader, a music player, a laptop computer, a desktop computer, a handheld gaming system, or any other data processing device that is attached to an optical or radio frequency code reader,” which may in turn be implemented as “a camera, optical scanner, near field communication reader, or other barcode or radio frequency identifier reader.” Spec. ¶ 53. The Specification states that “[t]he code reader module 52 can be a general purpose code reader module” and that “[m]any such modules are *readily available* to read a number of types of optically and radio frequency readable code.” *Id.* ¶ 54 (emphasis added).

Finally, “physical item having attached thereto at least one of a bar code, a QR code or other binary printed code” is also well-known, routine, and conventional. The Specification teaches a “code generating module 44 [that] uses any of a number of possible ways to combine the information of affiliate 18 identity, product identity, and any additional desired information

and generate an optically or radio frequency readable code.” Spec. ¶ 42.

The Specification states that

[t]he codes generated . . . can be any number of *currently existing* or not yet invented optically or radio frequency readable codes. Examples are common bar codes . . . QR codes, radio frequency identifier codes, and near field communication codes. . . . The affiliate crediting system 10 can be implemented in a way that the standard ISBN code that is provided on all physical books for sale can be supplemented with an additional code to indicate the affiliate 18 and . . . the internet merchant 24.

Spec. ¶ 42–43 (emphasis added).

In short, claim 1 requires using only a generic computer system, Internet, and client device, and “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.” *Alice*, 573 U.S. at 223. The use of “a bar code, a QR code or other binary printed code” to encode information, including product information, is likewise well-known, routine, and conventional. Thus, the combination of elements recited in claim 1 does not amount to significantly more than the judicial exception itself, and under 35 U.S.C. § 101 the claim is ineligible for patenting.

Appellant’s Arguments

Citing among other things to a declaration from the inventor,⁸ Appellant contends that the claims “improve upon technology for selling / distributing digital products, i.e., exclusively digital content” and “solve a

⁸ Declaration under 37 C.F.R. § 1.132 of Christian A. Lindensmith (July 26, 2018) (“Lindensmith Declaration”).

technological problem related to the sale of digital content, i.e., providing a balance between the needs of a digital product customer while crediting the correct physical affiliate for his/her role in making the digital sale.” Appeal Br. 21–22, 25–26; *see also* Reply Br. 3, 4–5. Appellant contends that, thus, “the sequencing of digital exchanges as set forth in independent claims 1 and 10 effectively integrates . . . concepts [set forth in the claims] into a practical application,” i.e., “a comprehensive system which improves a consumer’s experience by allowing the consumer to physically review digital items in a merchant’s store and thereafter digitally retrieve and pay for those items from an unrelated internet merchant at the consumer’s leisure at any location and at virtually any future point in time while still providing a credit to that merchant.” Appeal Br. 28.

We are not persuaded. As discussed above, the “sequencing of . . . exchanges” cited by Appellant as providing the alleged improvement is an abstract idea. The fact that the exchanges are digital (i.e., performed by computers) does not render the claims patent-eligible. To the extent such “sequencing of digital exchanges” in claim 1 in fact improved the process of providing credit to a physical retailer when an online purchase is made, the Supreme Court has explained that in order for such a process to be patent-eligible, it is the implementation of the abstract idea, not merely the abstract idea itself, that must provide the improvement. *Parker v. Flook*, 437 U.S. 584, 594–95 (1978) (holding that a claim that provides a “new and presumably better method for calculating alarm limit values” is not patent-eligible where the only novel feature was the mathematical formula (i.e., abstract idea)).

Appellant contends that the claims integrate any abstract idea into a practical application because the claim recites “a real-world, physical act and a practical application of the use of the ‘at least one of the bar code, a QR code or other binary printed code’ which contains the product information.” Reply Br. 4–5. Appellant contends that the claim limitations “employ the information provided by the judicial exception” and provide “a meaningful limit on the alleged judicial exception.” Reply Br. 4.

We are not persuaded. Like the respondent in *Flook*, Appellant “incorrectly assumes that if a[n] . . . application implements a principle in some specific fashion, it automatically falls within the patentable subject matter of § 101.” *Flook*, 437 U.S. at 593.⁹ We acknowledge that an additional element may integrate a judicial exception into a practical

⁹ Appellant contends that the claim is “analogous to the practical-application-steps in the October 2019 Subject Matter Eligibility Guidelines of ‘vaccinating a second group of domestic cats in accordance with the lowest-risk vaccination schedule.’” Reply Br. 4. We are not persuaded. In that example, the abstract idea recited in the claim was the mental process of “analyzing information about the vaccination schedules . . . to determine a lowest risk vaccination schedule.” USPTO, *October 2019 Update: Subject Matter Eligibility* (the “October 2019 Update”) (available at https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf). “[V]accinating a second group of domestic cats in accordance with the lowest-risk vaccination schedule” thus applies the recited judicial exception. In contrast, in this case, the abstract idea is a method of organizing human activity (i.e. the method executed by the claimed computer program product for providing credit to a physical affiliate). The performance of the abstract method itself, therefore, cannot be said to be an “application” of the abstract idea. *See, e.g., Bilski*, 561 U.S. at 599, 611 (2010) (holding claimed method to be patent ineligible as directed to the abstract idea of hedging despite steps requiring initiating series of transactions).

application if it “implements a judicial exception with, or uses a judicial exception in conjunction with, a *particular* machine or manufacture that is *integral* to the claim.” 84 Fed. Reg. 55 (emphasis added). In this case, however, claim 1 recites only a generic “physical item”; moreover, the physical item is used merely as a means for providing data for use in the method performed by the claimed computer program product.

“Use of a machine that contributes only nominally or insignificantly to the execution of [a] claimed method (e.g., in a data gathering step or in a field-of-use limitation) would not integrate a judicial exception or provide significantly more.” MPEP § 2106.05(b) (citing *CyberSource v. Retail Decisions, Inc.*, 654 F.3d 1366, 1370 (Fed. Cir. 2011) (“We have held that mere ‘[data-gathering] step[s] cannot make an otherwise nonstatutory claim statutory.’”) (alterations in original)). Thus, the incidental use of the recited generic “machine or manufacture” (i.e., “physical item having attached thereto at least one of a bar code, a QR code or other binary printed code which contains the product information”) does not suffice to integrate the abstract idea recited in claim 1 into a practical application, even if, according to Appellant, the particular combination of data included on the physical item (i.e., “information which identifies the digital product, an internet address identifying the internet merchant, and [the] physical affiliate”) is novel.

Finally, citing again to the Lindensmith Declaration, Appellant contends that the “unique sequencing of digital exchanges according to independent claims 1 and 10 was not widely prevalent or in common use among publishers and vendors of digital content at the time of Appellant’s discovery.” Appeal Br. 25. Appellant contends that, for instance,

“determining that the digital product was purchased from the internet merchant” where the internet merchant is different from the physical affiliate, and “provid[ing] credit to the physical affiliate . . . in an absence of any participation in the purchase by a point of sale or other system owned or operated by the affiliate” and “without requiring the client device to be located at the physical affiliate when the digital product is purchased from the internet merchant,” as required by the claims, are not “well understood, routine, or conventional . . . when viewed in relation to a sales transaction focused exclusively on digital content.” *Id.* at 17–18. Likewise, Appellant contends that “a physical item . . . ‘having attached thereto at least one of a bar code, a QR code or other binary printed code which contains the product information which identifies the digital product, an internet address, and said affiliate’ was not well understood, routine, or conventional activity in any field, much less . . . the relevant field, i.e., a retailer desiring to sell digital content.” *Id.* at 24.

We are not persuaded. As discussed above, the limitation of “provid[ing] credit to the physical affiliate . . . in an absence of any participation in the purchase by a point of sale or other system owned or operated by the physical affiliate, and without requiring the client device to be located at the physical affiliate when the digital product was purchased from the internet merchant,” is part of the statement of the abstract idea and, on its own, cannot render the claim patent-eligible even if it is novel. *Flook*, 437 U.S. at 591 (1978).

Similarly, physical items having attached thereto at least one of a bar code, a QR code, or other binary printed code containing product information is well-known, routine, and conventional, as shown by

statements in the Specification cited above. *See, e.g.*, Spec. ¶ 42 (stating that “[t]he codes . . . can be any number of *currently existing* or not yet invented optically or radio frequency readable codes” and that “[e]xamples are *common* bar codes . . . QR codes, radio frequency identifier codes, and near field communication codes” (emphasis added)); *see also infra* FF15, FF16, FF19, FF20 (prior art teaching use of binary printed codes such as barcode to encode information relating to the product, the associate/affiliate, and the merchant).

Finally, to the extent Appellant argues it is not well-known, routine, or conventional to encode the particular combination of information in the bar code, QR code, or other binary printed code, we find that the particular information used in the method performed by the claimed computer program product is part of the recited abstract idea and thus does not confer patent eligibility on claims that are not otherwise eligible.

Accordingly, we affirm the Examiner’s rejection of claim 1 as being directed to a judicial exception to patent eligible subject matter, without significantly more. Claims 2, 3, 5–10, 12, and 14–18, which are not separately argued, fall with claim 1.

C. Obviousness rejections over Bezos and Foulser (claims 1–3, 5–8, 10, 12, and 14–17) and Bezos, Foulser, and Reber (claims 9 and 18)

1. Issue

The same issues are dispositive for both of the obviousness rejections. We, therefore, discuss them together. The Examiner finds that Bezos discloses most of the limitations of claim 1 but does not disclose that “the

product information is obtained and decoded via a client device from a physical item having attached . . . a . . . code which . . . identifies the digital product, an internet address identifying the internet merchant, and . . . physical affiliate”; that “the product is a digital product or group of digital products”; and “computer-readable program code that when executed by hardware” “determine[s] that the digital product was purchased from the internet merchant via the client device” and “delivers . . . the digital product to a recipient device by downloading the digital product via a computer network.” Final Act. 6–7. However, the Examiner finds that Foulser teaches or suggests these limitations. The Examiner concludes that a skilled artisan would have had reason to modify Bezos with the teachings of Foulser in order to “enable identification of products and the other transactional information . . . to facilitate the purchase of digital products.” *Id.* at 7.

Appellant contends that “the combination of Bezos with Foulser still would not teach or suggest Appellant’s invention.” *See, e.g.*, Reply Br. 9–10. Appellant further contends that it would not have been obvious to modify the teachings of Bezos with those of Foulser. Appeal Br. 36; *see also* Reply Br. 8–10. Finally, Appellant contends that “Appellant’s claims solve a long felt need facing independent publishers of digital content that existed long before Appellant’s priority date.” Appeal Br. 40; *see also* Reply Br. 10–11.

Appellant does not separately argue the claims. We, therefore, focus our analysis on claim 1 as representative. The issues with respect to these rejections are (1) whether a preponderance of evidence supports the Examiner’s conclusion that the combination of Bezos and Foulser renders claim 1 *prima facie* obvious, and, if so, (2) whether Appellant has provided

evidence of long-felt need that, when considered together with the evidence of obviousness, shows claim 1 to be non-obvious.

2. Findings of Fact

1. Bezos teaches “an Internet-based referral system that enables individuals and other business entities (‘associates’) to market products, in return for a commission, that are sold from a merchant’s Web site.” Bezos Abstract.

2. Bezos teaches that,

[f]ollowing registration, the associate sets up a Web site (or other information dissemination system) to distribute hypertextual catalog documents that includes marketing information (product reviews, recommendations, etc.) about selected products of the merchant. In association with each such product, the catalog document includes a hypertextual “referral link” that allows a user (“customer”) to link to the merchant’s site and purchase the product.

Bezos Abstract.

3. Bezos teaches “a preferred format of a URL **400** used by an associate to create a referral link to the merchant Web site,” which comprises “the merchant Web server information **402**, the unique product ID **404**, the unique store ID **406**, and an associate commission scheme ID **408**.” Bezos 11:4–7.

4. Bezos teaches that, in its system,

[w]hen a customer selects a referral link, the customer’s computer transmits unique IDs of the selected product and of the associate to the merchant’s site, allowing the merchant to identify the product and the referring associate. If the customer subsequently purchases the product from the merchant’s site, a commission is

automatically credited to an account of the referring associate.

Bezos Abstract; *see also id.* at 1:66–2:14, 7:21–40, 10:55–60, 12:59–63, 14:38–41.

5. Bezos teaches that “[t]he customer computer **108** may be any type of computing device that allows a user (‘customer’) to interactively browse Web sites via a Web browser **112**.” Bezos 6:6–9.

6. Bezos teaches “an associate database of the merchant site” that stores “a unique associate ID . . . (together with other associate information),” wherein the associate ID is generated and assigned to the associate applicant during the enrollment process. Bezos 2:39–44; *see also id.* at 11:7–9, 14:38–41.

7. Bezos teaches that,

[a]lthough the embodiment described herein uses Web technology to disseminate the catalog documents, any of a variety of document types and electronic dissemination technologies can be used. For example, the associate’s catalog documents may be in the form of hypertextual e-mail messages that are disseminated by a list server, or PUSH documents disseminated by a PUSH server. As interactive television, video-on-demand, and Web TV technologies continue to evolve, it is contemplated that the “catalog documents” will include video advertisements that are displayed to the customer on a television screen. Further, although hypertextual catalog documents are preferably used, it is possible for an associate to use non-hypertextual catalogs (including paper-based product catalogs) that simply instruct the customer to manually enter the appropriate URL (including the referral information) into a browser program.

Bezos 8:32–48.

8. Foulser teaches

[s]ystems and methods for crediting a retailer for an online purchase made by a consumer while the consumer is located within or in the proximity of a store location of the retailer.

Foulser Abstract; *see also id.* at 1:6–11, 2:3–5, 2:17–19, 2:66–3:3, 5:66–6:6.

9. Foulser teaches an exemplary system including retailer “having a physical retail store location.” *Id.* at 3:49–52.

10. Foulser teaches that,

[a]fter browsing a retail location for a product, a consumer can purchase the product from an Internet merchant different than that of the retailer using a mobile or networked client device. The client device can include a module for determining the location of the client device at the time of purchase and include the location information with information used to complete the purchase of the product.

Foulser Abstract, *see also id.* at 3:3–10, 3:56–63.

11. More particularly, Foulser teaches

a computer program product for providing a credit to a retailer for a purchase made by a consumer from an Internet merchant. The computer program product can include a computer-readable medium including computer-readable program code for receiving information identifying a product for purchase; computer-readable program code for receiving information identifying a location of a device used by the consumer to purchase the product; computer-readable program code for determining whether the location of the device corresponds to a retail location of the retailer; and computer-readable program code for providing a credit to

the retailer based on a determination that the location of the device corresponds to a retail location of the retailer.

Foulser 1:43–56; *see also id.* at 2:5–16, 2:19–29, 3:12–15, 5:66–6:6.

12. Foulser teaches “completing, by the computer system, the purchase of the product,” after receiving information “identifying a product a consumer intends to purchase” and “information identifying a location of the consumer.” Foulser 2:21–23; *see also id.* at 10:21–23, 10:26–28 (teaching that, “[i]f the consumer . . . purchased a digital product for download, the Web server . . . can transmit the product to the client device . . . via the Internet”).

13. Foulser teaches “the term ‘products’ should be interpreted to include tangible products and intangible products, as well as services.” Foulser 3:54–56. Foulser teaches that the products may be digital products. *Id.* at 10:26–28.

14. Foulser teaches that “[t]he client device . . . can include a portable computer . . . , mobile phone . . . , personal digital assistant . . . , or other device having Internet or other communication capabilities.” Foulser 3:64–67.

15. Foulser teaches that the client device can include a product identification module, which can include “a scanner . . . for scanning a barcode, such as a universal product code (‘UPC’), a two-dimensional barcode, a Quick Response code (‘QR code’), a European Article Numbering (‘EAN’) barcode, or other type of barcode.” Foulser 4:44–50; *see also id.* at 4:57–65 (teaching that product identification module can also include an RFID reader for reading RFID tags or a camera for taking a picture of a barcode, in-store signage associated with a product, or the product itself), 7:15–19, 9:4–9, 9:46–52, 10:21–23, 9:46–52.

16. Foulser teaches that “[i]n certain exemplary embodiments, an in-store poster or other signage associated with a product may have a barcode or other scannable image or graphic printed or attached thereon for the consumer [to] scan with the client device.” *Id.* at 4:50–53.

17. Foulser teaches

a data storage unit coupled to the computer system for storing information identifying a plurality of retailers; and a retailer crediting module coupled to the computer system for determining whether the location of the device corresponds to a retail location of the retailer and for providing a credit to the retailer based on a determination that the location of the device corresponds to a retail location of the retailer.

Foulser 1:62–2:2; *see also id.* at 3:12–15, 5:66–6:30, 6:55–62, 6:67–7:10.

18. Foulser teaches that

location information can include an actual geographic location, a store identifier, or a retailer identifier. The online merchant can match the location information with retailer information to determine whether a credit for the purchase should be given to a retailer.

Foulser Abstract; *see also id.* at 3:10–12.

19. Foulser teaches a location identification module of a client device that can include “a scanner for scanning in-store posters or signage having information identifying the retailer . . . and/or the retail store location,” which can include “the name of the retailer . . . , a code for the retailer . . . , a store name, or a store code.” *Id.* at 5:24–30; *see also id.* at 8:5–8, 9:25–27.

20. Foulser teaches that “a retailer . . . that displays signage for an online merchant **120**, or a QR code associated with a link to purchase a product from an online merchant **120** can receive additional credits when a

consumer . . . purchases the product from an online merchant **120.**” *Id.* at 8:56–62.

3. *Analysis*

Except as otherwise noted, we adopt the Examiner’s findings of fact and reasoning regarding the scope and content of the prior art with respect to claim 1 (Final Act. 6–7, 9–12, FF1–FF20) and agree that claim 1 is obvious over Bezos and Foulser. We address the Appellant’s arguments below. Only those arguments timely made by Appellant in the briefs have been considered; arguments not presented in the briefs are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Appellant contends that “the combination of Bezos with Foulser still would not teach or suggest Appellant’s invention.” *See, e.g.*, Reply Br. 9–10. More particularly, Appellant contends that Bezos does not teach “physical affiliates,” “a potential customer/client obtain[ing] digital product information from a physical item at the location of a physical affiliate,” or “provid[ing] a credit to the physical affiliate . . . in the absence of any participation in the purchase by a point of sale or other system owned or operated by the [physical] affiliate.” Appeal Br. 31–33, 39; *see also* Reply Br. 5–7, 9. Appellant contends that Foulser does not teach “provid[ing] credit to the physical affiliate . . . without requiring the client device to be located at the physical affiliate when the digital product was purchased from the internet merchant.” Appeal Br. 34; *see also id.* at 37–38.

We are not persuaded. As an initial matter, “[n]on-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. . . .

[The reference] must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole.” *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

In this case, to the extent Bezos does not clearly teach a “physical affiliate,” i.e., “a retailer or party with a physical presence,” Spec. ¶ 34, Foulser clearly teaches such affiliates.¹⁰ *See, e.g.*, FF9. Foulser also teaches a client device obtaining product information “via a client device from a physical item having attached thereto at least one of a bar code, a QR code or other binary printed code,” and further teaches that such product information may include information identifying the product, the retailer (i.e., physical affiliate), and the Internet merchant. FF15, FF16, FF19, FF20.

Similarly, Foulser teaches crediting a retailer for an online purchase from a different Internet merchant, made by a consumer from a client device after browsing a retailer location for a product (i.e., “in an absence of any participation in the purchase by a point of sale or other system owned or operated by the physical affiliate”). FF10, FF11. Indeed, contrary to Appellant’s argument, we find that Bezos also suggests or teaches providing credit to the physical affiliate in an absence of any participation in the purchase by a point of sale or other system owned or operated by the physical affiliate. For example, assuming for the sake of argument that providing hypertextual links on an associate’s website or in an e-mail message may be considered “participation in the purchase by a point of sale

¹⁰ The Examiner appears to find that Bezos discloses physical affiliates. *See, e.g.*, Final Act. 6–7. However, we do not rely on this finding in our decision because, as the Examiner points out, Foulser explicitly teaches physical affiliates, i.e., a retailer or party with a physical presence. Ans. 7.

or other system owned or operated by the . . . affiliate,” we note that Bezos also teaches that an associate can use paper-based product catalogs that “simply instruct the customer to manually enter the appropriate URL (including the referral information) into a browser program” to purchase a product. FF7. In such a scenario, there is no participation in the purchase by a point of sale or other system owned or operated by the affiliate.

Neither are we persuaded by Appellant’s contention that claim 1 is non-obvious because Foulser does not teach “provid[ing] credit to the physical affiliate . . . without requiring the client device to be located at the physical affiliate when the digital product was purchased from the internet merchant.” Appeal Br. 34; *see also id.* at 37–38.

First, although Foulser teaches a method that credits retailer for an online purchase made by a consumer while the consumer is located within a store location of the retailer, the method also allows crediting of the retailer where a consumer is not within a store location but in the proximity of the store location. FF8. Appellant does not explain why the broadest reasonable interpretation of “without requiring the client device to be located *at* the physical affiliate,” consistent with the Specification, would not encompass a scenario where the client device is in proximity of the store location but not within (i.e., *at*) the physical affiliate. *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000).

Moreover, although Foulser teaches that in certain embodiments the location of the client device refers to actual geographic location, Foulser also teaches that location information may simply refer to the name or code of a retailer or store, obtained for example by scanning an in-store poster or signage containing such information. FF18, FF19. In other words, the

“location” of the device, for purposes of Foulser’s method, can be distinct from the “actual geographical location” of the device, such as that obtained through a GPS system. *Id.* These teachings suggest a method of crediting a physical affiliate for the purchase of a digital product “without requiring the client device to be located at the physical affiliate [(i.e., without requiring the client device to be geographically within a retail location of a physical affiliate)] when the digital product was purchased from the internet merchant,” for instance where a customer uses the client device to scan the in-store poster or signage to obtain location information in the form of store name or code but purchase the digital product only after leaving the store.

Finally, Bezos teaches that an associate may receive a credit even if a purchase was made separate from the associate’s website, by providing a physical item (e.g., paper-based product catalogs) containing information regarding the internet merchant, the product ID, and the unique store (i.e., affiliate) ID in the form of a referral code that the customer can then enter manually. FF3, FF7. Although Bezos does not explicitly teach an associate/affiliate with a physical presence, Foulser does, and the combination of these teachings suggests the claim limitation of providing credit to a physical affiliate “without requiring the client device to be located at the physical affiliate when the digital product was purchased from the internet merchant.”

Appellant also contends that,

while Foulser discloses “an in-store poster or other signage associated with a product which may have a barcode or other scannable image or graphic printed or attached thereon” for a consumer to scan with a device, Foulser does not suggest that the barcode or other scannable image should be printed or attached to an identifier card . . . which can be conveniently removed from the store, or that the barcode or

scannable image should contain product information that identifies three required elements: the digital product, an internet address and the affiliate.

Appeal Br. 35–36, 38–39; *see also* Reply Br. 7–10. Appellant contends that, in fact, “neither Foulser nor Bezos disclose or suggest that the barcode or scannable image should contain product information that identifies three required elements: (i) the digital product, (ii) an internet address and (iii) the affiliate.” Reply Br. 8–9.

We are not persuaded. Claim 1 does not require that the barcode or other scannable image be printed or attached to an identifier card that can be conveniently removed from the store.¹¹ Foulser teaches in-store poster or other signage that may have a bar code or other scannable images that identify a product, that identify the store (i.e., physical affiliate), or that identify the internet merchant. FF15, FF16, FF19, FF20. It would have been obvious to a skilled artisan to combine these teachings to arrive at “a physical item having attached thereto at least one of a bar code, a QR code or other binary printed code which contains the product information which identifies the digital product, an internet address identifying the internet merchant, and [the] physical affiliate,” because “[t]he combination of

¹¹ Even if claim 1 required an “identifier card . . . which can be conveniently removed from the store,” we note that Bezos teaches “paper-based product catalogs” containing information relating to the product, the associate/affiliate, and the Internet merchant. FF7. Such a paper-based product catalog would have the ability to be conveniently removed from a store. This teaching, combined with Foulser’s teaching to encode product information using barcode or other scannable image, would render obvious “barcode or other scannable image [encoding product information] printed or attached to an identifier card . . . that can be conveniently removed from the store.”

familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). Such a combination is particularly obvious in this case because Bezos explicitly teaches the combination of information that identifies a product, an internet merchant, and the referring associate/affiliate for purposes of providing credit to a referring associate/affiliate, albeit in a referral link rather than in “at least one of a bar code, a QR code or other binary printed code” on a physical item.FF3.

Appellant further contends that it would not have been obvious to modify the teachings of Bezos with those of Foulser and that “the Examiner has proposed a combination that a person of skill in the art would not consider.” Appeal Br. 36–37; Reply Br. 8–10. In this regard, Appellant contends that “the combined teachings of Foulser and Bezos would not teach a system that provides a consumer with an opportunity to physically review items in a merchant’s store, i.e., at the location of the physical affiliate.” Reply Br. 9.

We are not persuaded. Both Bezos and Foulser teach referral systems that enable individuals and other business entities to market products sold by an Internet merchant in return for a commission. A skilled artisan would have had reason to combine the teachings of these two references in order to extend the benefit of the referral system discussed in Bezos, *see, e.g.*, Bezos 1:24–46 (invention addresses problems faced by online merchants to effectively market goods via their Web sites and to efficiently attract potential consumers to their Web sites), by allowing an Internet merchant to “efficiently market and sell goods” in cooperation with a retailer or party with a physical presence, such as those described in Foulser, as well as with

the “Web sites or other network sites of respective business partners” taught by Bezos. Neither has Appellant provided any specific, persuasive reason why a skilled artisan would not have considered combining Bezos and Foulser.

As to Appellant’s contention that the cited prior art combination “would not teach a system that provides a consumer with an opportunity to physically review items in a merchant’s store, i.e., at the location of the physical affiliate,” Reply Br. 9, we note that Foulser explicitly teaches that a benefit of its invention is to allow “retailers having physical retail locations . . . a means to capitalize on in-store Internet purchases in order to avoid losing significant revenue” while continuing to “allow consumers to browse products in a retail store location but purchase the product outside of the retailer’s environment,” e.g., via an Internet Web site of a different merchant. Foulser 1:23–39. Moreover, claim 1 does not recite “a system that provides a consumer with an opportunity to physically review items in a merchant’s store,” and, “[i]n determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. . . . [A]ny need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR*, 550 U.S. at 419–20.

Finally, citing to the Lindensmith Declaration, Appellant contends that “Appellant’s claims solve a long felt need facing independent publishers of digital content that existed long before Appellant’s priority date.” Appeal Br. 39–41; *see also* Reply Br. 10–11.

“Evidence that an invention satisfied a long-felt and unmet need that existed on the patent’s filing date is a secondary consideration of nonobviousness.” *Perfect Web Technologies, Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1332 (Fed. Cir. 2009). We agree with the Examiner, however, that Appellant has not provided persuasive evidence of “a long-felt need alleviated by the [invention],” such as by providing “evidence to explain how long this need was felt, . . . when the problem first arose,” and how the invention “met any such ‘need.’” *Perfect Web Technologies, Inc.*, 587 F.3d at 1332–1333.

Appellant contends that the Lindensmith Declaration includes citations to articles “which describe the changes facing independent bookstores in the 1995 to 2009 timeframe and the difficulty facing independent publishers of ebooks where the titles are not available in print, i.e., ‘showrooming’ was not available as a sales mechanism so readers could not discover new books on a physical display,” as well as citations to articles “which describe the state of the art just prior to Appellant’s priority date and the difficulty at that time in developing sales channels for ebooks.” Appeal Br. 39–40. Appellant contends that, unlike the solutions proposed in the state of the art prior to Appellant’s priority date, Appellant’s claims “bridg[e] the gap between (i) online selling and (ii) selling ebooks in physical spaces.” *Id.* at 40.

We are not persuaded. Putting aside the fact that Appellant provides no specific citations to the articles where the alleged “long-felt” problem is described, Appellant has cited little evidence, other than attorney argument and conclusory statements in the inventor declaration, that the claimed invention has solved the problem(s) of “changes facing independent

bookstores,” “difficulty facing independent publishers of ebooks where the titles are not available in print,” and “difficulty . . . in developing sales channels for ebooks.” Appeal Br. 39–40. In this regard, we note that “[a]ttorneys’ argument is no substitute for evidence,” *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1581 (Fed. Cir. 1989), and opinion evidence in declarations has little value without factual support, *In re Beattie*, 974 F.2d 1309, 1313 (Fed. Cir. 1992). In any event, “evidence of secondary considerations does not always overcome a strong prima facie case showing of obviousness.” *Perfect Web Technologies*, 587 F.3d at 1333 (internal quotation marks omitted). We find that Appellant’s proffered evidence that the invention alleviated a long-felt need, which is conclusory at best, does not overcome the strong prima facie case of obviousness in view of the combination of Bezos and Foulser.

According, we affirm the Examiner’s rejection of claim 1 over Bezos and Foulser. Claims 3, 5–8, 10, 12, and 14–17, which are not separately argued, fall with claim 1. Appellant provides no additional argument with respect to the rejection of claims 9 and 18 over Bezos, Foulser, and Reber. We, therefore, affirm the rejection for the same reasons discussed above.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3, 5–10, 12, 14–18	112(b) or 112 (pre-AIA), second paragraph	Indefiniteness		1, 3, 5–10, 12, 14–18
1, 3, 5–10,	101	Eligibility	1, 3, 5–10,	

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
12, 14–18			12, 14–18	
1, 3, 5–8, 10, 12, 14–17	103	Bezos, Foulser	1, 3, 5–8, 10, 12, 14–17	
9, 18	103	Bezos, Foulser, Reber	9, 18	
Overall Outcome			1, 3, 5–10, 12, 14–18	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED